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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/772,509	02/05/2004	Mark Temple	MT001	5674

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EXAMINER

CONLEY, FREDRICK C

ART UNIT PAPER NUMBER

3673

DATE MAILED: 12/30/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/772,509

Applicant(s)

TEMPLE, MARK

Examiner

FREDRICK C. CONLEY

Art Unit

3673

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 October 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-2 and 4-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 6,601,253 to Tarquinio in view of U.S. Pat. No. 6,782,575 to Robinson.

Claim 1, Tarquinio discloses a supportive upper body constraint device, comprising;

a base 24 comprising a foam material with an impression load deflection and a cover 20 on the base comprising a foam material with an ILD ratio less than the base (col. 1 lines 27-35). Tarquinio fails to disclose the ILD ratio of the base greater than 40. Robinson discloses a support having a base 11 with a ILD ratio greater than 40 (col. 3 lines 17-18). It would have been an obvious to have the ILD ratio greater than 40 as taught by Robinson in order to render the overall mattress of Tarquinio somewhat firmer.

Claim 2, wherein the cover comprises an elastomeric foam material with an ILD ratio less than about 14 (col. 3 lines 3-6)(Tarquinio).

Claim 4, wherein the cover comprises a material having a smooth surface (fig. 1).

Claim 5, wherein the base and support members are unitarily constructed.

Claim 6, Tarquinio fails to disclose the density of the cover in the range of about 3.8 to 4 pounds per cubic foot. It would have been an obvious to have the density stated above, since Applicant has not disclosed that the specific density is critical and it would appear that the density of Tarquinio would perform equally well.

Claims 1-3 and 5-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 4,853,993 to Walpin et al. in view of U.S. Pat. No. 6,782,575 to Robinson.

Claim 1, Walpin discloses a supportive upper body constraint device, comprising:
a base 22

a cover 30 on the base. Walpin fails to disclose the cover having an ILD ratio less than the base. Robinson discloses a cushion having a cover 12 with an ILD ratio less than a base 11 (col. 2 lines 19-23). It would have been an obvious to have the ILD ratio of the base greater than the cover as taught by Robinson in order to render the overall mattress of Walpin somewhat firmer while providing minimum body pressure.

Claim 2, Walpin fails to disclose the cover comprising an elastomeric foam material with an ILD ratio less than about 14. Robinson discloses a cover 12 with an elastomeric foam material with an ILD ratio less than about 14 (col. 3 lines 39-40)(Robinson). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ a foam for the cover of Walpin with an ILD ratio less than about 14 as taught by Robinson in order to provide minimum body pressure.

Claim 3, further comprising opposing support members (26,27) on the base, the cover disposed in a concave contour defining a cavity (fig. 6)(Walpin).

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Claim 5, wherein the base and support members are unitarily constructed.

Claim 6, Walpin, as modified, fails to disclose the density of the cover in the range of about 3.8 to 4 pounds per cubic foot. It would have been an obvious to have the density stated above, since Applicant has not disclosed that the specific density is critical and it would appear that the density of Walpin would perform equally well.

Claims 7-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 4,853,993 to Walpin et al. in view of U.S. Pat. No. 6,601,253 to Tarquinio.

Claim 7, Walpin discloses a supportive upper body constraint device, comprising a base (10,21,22) comprising a substantially flat longitudinal surface 10 and an inclined surface (21,22)(fig. 1-2), a pair of opposing support members (26,27) on the inclined surface; and a cover 30 continuously covering the support members. Walpin fails to disclose a portion of the inclined surface between the support members comprising a visco-elastic foam material. Tarquinio discloses cushion having a cover 20 with a portion of a surface between support members (26,28) comprising a visco-elastic foam material. It would have been obvious to one having ordinary skill in the art at the time of the invention to have a cover of visco-elastic foam material as taught by Tarquinio in order to provide reduced compression of the mattress when a weight is placed on the upper surface of the cushion.

Claim 8, wherein the support members are wedge-shaped, the cover disposed in a concave contour defining a cavity (fig. 6)(Walpin).

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Claim 9, wherein the cover 20 comprises a smooth surface (Tarquinio).

Claim 10, wherein the base and support members are unitarily formed.

Claims 11-13 are rejected under 35 U.S.C. 103(a) as being

unpatentable over U.S. Pat. No. 4,853,993 to Walpin et al. in view of U.S. Pat. No.

6,601,253 to Tarquinio, and further in view of U.S. Pat. No. 6,782,575 to Robinson.

Claims 11 and 18, Walpin, as modified, fails to disclose the ILD ratio of the base greater than 40. Robinson discloses a support having a base 11 with a ILD ratio greater than 40 (col. 3 lines 17-18). It would have been an obvious to have the ILD ratio greater than 40 as taught by Robinson in order to render the overall mattress of Walpin somewhat firmer.

Claim 12, Walpin, as modified, fails to disclose the cover comprising a foam material with an ILD ratio less than about 14. Robinson discloses a cover 12 with an elastomeric foam material with an ILD ratio less than about 14 (col. 3 lines 39-40)(Robinson). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ a foam for the cover of Walpin with an ILD ratio less than about 14 as taught by Robinson in order to provide minimum body pressure.

Claim 13, Walpin, as modified, fails to disclose the density of the cover in the range of about 3.8 to 4 pounds per cubic foot. It would have been an obvious to have the density stated above, since Applicant has not disclosed that the specific density is critical and it would appear that the density of Walpin would perform equally well.

Response to Arguments

Applicant's arguments filed 10/05/05 have been fully considered but they are not persuasive.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Tarquinio clearly teaches a supportive upper body constraint device comprising a top layer with a first indentation load deflation rating, a second layer with a second indentation load deflection rating, and a base with a third indentation load deflection rating wherein the third ILD is greater than the second ILD, and the second ILD is greater than the first (col. 1 lines 15-27). Therefore, the top cover layer of Tarquinio has an ILD ratio less than the base as claimed by the Applicant. Tarquinio fails to disclose the base having an ILD ratio that is greater than 40. It is well known in the art that to merely change a range of values for a structural element, such as the ILD ratio of the base, is considered an obvious modification. Robinson, however, discloses a mattress having a base with an ILD ratio in the range of 24-50. Both Tarquinio and Robinson disclose mattresses comprised of multiple layers of foam with different ILD ratios. The combination as a whole would suggest to one having ordinary skill to modify the base of Tarquinio to have an ILD ratio within the range that is greater than 40, as suggested by Robinson, wherein the base ILD ratio is greater than the top cover in order to provide firm support for the base of Tarquinio. In response to applicant's argument that the

examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As stated above, it is well known in the art that to merely change a range of values for a structural element, such as the ILD ratio for the base layer, is considered an obvious modification and Tarquinio clearly teaches a supportive upper body constraint device wherein the base layer has an ILD greater than the ILD ratio of the top cover layer (col. 1 lines 15-27).

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Walpin discloses a supportive upper body constraint device comprising a base 22 and a cover 30 on the base. Walpin fails to disclose the cover having an ILD ratio less than the base. Robinson discloses a cushion having a cover 12 with an ILD ratio less than a base 11 (col. 2 lines 19-23) and a cover 12 with an elastomeric foam material with an ILD ratio

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less than about 14 (col. 3 lines 39-40). With Walpin and Robinson disclosing mattresses comprised of multiple layers of foam the combination as a whole would suggest to one having ordinary skill to modify the base of Walpin to have an ILD ratio within the range that is greater than 40 and the cover having an elastomeric foam less than 14 in order to provide minimum body pressure to an occupant lying upon the mattress.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. Walpin discloses a supportive upper body constraint device comprising a base 22 and a cover 30 on the base. Tarquinio discloses cushion having a cover 20 with a portion of a surface between support members (26,28) comprising a visco-elastic foam material. It is widely known to employ a variety of different materials based on an individual's needs and the combination as a whole would have suggested employing visco-elastic foam material as taught by Tarquinio in the cover of Walpin order to provide reduced compression of the mattress when a weight is placed on the upper surface of the cushion.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to FREDRICK C. CONLEY whose telephone number is 571-272-7040. The examiner can normally be reached on M-TH.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, HEATHER SHACKELFORD can be reached on 571-272-7049. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

FC



Suzanne Dino Barrett
Primary Examiner